

FILE COPY

Office Supreme Court, U. S.
F I L E D

MAY 19 1926

WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. ~~100~~ 362.

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

vs.

THE UNITED STATES.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI TO THE COURT OF CLAIMS.**

HUMPHREYS & DAY,
Counsel for Petitioner.

✓ **ADRIAN C. HUMPHREYS,**
✓ **CHESTER A. GWINN,**
Of Counsel.



INDEX.

	Page
Brief and argument in support of petition for writ of certiorari.	1
A. Foreword	1
B. The materials were requisitioned by the Government...	3
C. "Just compensation" includes interest when payment is not made contemporaneously with the taking of the property	6
D. The provision of the Fifth Amendment to the Constitu- tion of the United States, requiring that just compen- sation be paid for private property taken for public use, should be liberally construed in favor of the claimant	10
Conclusion	12

TABLE OF CASES CITED.

Boyd v. United States, 116 U. S., 616, 635; 6 Sup. Ct. Rep., 524.	11
Brooks-Scanlon Corporation v. United States, 265 U. S., 106; 44 Sup. Ct. Rep., 471.....	2, 9, 10, 12
Monongahela Navigation Company v. United States, 148 U. S., 312; 37 L. Ed., 463; 13 Sup. Ct. Rep., 626.....	7, 11, 12
Seaboard Air Line Railway Company v. United States, 261 U. S., 299; 43 Sup. Ct. Rep., 354.....	2, 5, 8, 12
United States v. Benedict, 261 U. S., 294; 43 Sup. Ct. Rep., 357	9
United States v. Rogers et al., 255 U. S., 163; 41 Sup. Ct. Rep., 281.....	9
United States v. New River Collieries Company, 262 U. S., 341	7, 8

OTHER AUTHORITIES CITED.

Act of Congress, March 4, 1917 (39 Stat., 1193).....	1
Act of Congress, June 5, 1917 (40 Stat., 182).....	1
Judicial Code, Section 177.....	2, 9
Lawson on Contracts, Section 261.....	5
9 Cyc., 451.....	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1170.

LIGGETT & MYERS TOBACCO COMPANY,
PETITIONER,

vs.

THE UNITED STATES.

**BRIEF AND ARGUMENT IN SUPPORT OF
PETITION.**

A.

Foreword.

The sole question to be argued in this case is whether petitioner is entitled to recover interest as a part of the measure of just compensation guaranteed to it by the Fifth Amendment of the Constitution of the United States and as provided in the acts of Congress approved March 4, 1917 (39 Stat., 1195), and June 15,

1917 (40 Stat., 182), under which the requisition order was issued by the Navy Department and which provides that the President "shall make just compensation" for any materials requisitioned thereunder.

The Court of Claims entered judgment in favor of petitioner in the principal amount claimed, which represented the fair market value of the materials requisitioned at the time of their taking, but refused to allow interest on said amount, on the ground that there was a contract between the petitioner and the Government which brought the case within the provisions of section 177 of the Judicial Code of the United States.

Petitioner contended in the Court of Claims that its property was requisitioned by an *obligatory order* issued under the authority of the President of the United States, conferred by the acts of Congress aforesaid, and that interest from the date of taking to the date of judgment was recoverable as a part of the measure of just compensation guaranteed by the Fifth Amendment and relied upon the decisions of this Court in the cases of Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S., 299; 43 Sup. Ct. Rep., 354; Brooks-Scanlon Corp. *vs.* United States, 265 U. S., 106; 44 Sup. Ct. Rep., 471, and other decisions of this Court.

The order issued by the Navy Department (Navy Order, N-4128) is printed in the record (R., 11). It speaks for itself. It provided a line on which petitioner was required to and did sign. Such signing under the requirements of the order constituted an

acknowledgment rather than a legal "acceptance" of an "offer." If the order constituted a *requisition*, it was a requisition regardless of whether petitioner signed on the dotted line or not.

The Court of Claims held that there was no requisition by the Government of plaintiff's property. The court took judicial notice of the fact that the President did authorize the Secretary of the Navy to act for him under the above-mentioned statutes providing for the requisitioning of materials, etc., but held that the power was not exercised in this case (R., 38).

We think it unnecessary to go beyond the terms of the order ~~and~~ the court's findings of facts (R., 28) to determine this question. However, there was testimony by Mr. C. W. Toms, vice-president of the petitioner, showing that the petitioner regarded the order as obligatory and filled it relying upon the Government to pay just compensation for the property requisitioned.

The Court of Claims had jurisdiction to determine "just compensation" in this case under the specific provisions of the acts of Congress under which the property was requisitioned. Its jurisdiction did not depend upon contract, either expressed or implied.

B.

The Materials were Requisitioned by the Government.

The facts of the case show that the materials were requisitioned by an obligatory order with which the claimant was forced to comply. Interest is, therefore,

claimed as a proper addition to the fair market value of the goods at the time they were taken to "produce full equivalent of such value paid contemporaneously." *Brooks-Scanlon vs. United States, supra.*

There was no contract between the petitioner and the Government in this case, because the meeting of the minds, which is the first essential of a valid contract, was not present. The order stated that "compliance with this order is obligatory and no commercial orders shall be allowed by you to interfere with delivery herein provided for." The order further stated that it was placed under subparagraph (b) of said order, subparagraph (a) being eliminated.

Regardless of the statement that the order was placed under subparagraph (b), the Navy Department, in its letter of December 4, 1920, purporting to establish prices for the materials furnished by petitioner, stated that Navy Order N-4128 "is hereby modified to apply under the terms and conditions of subparagraph (a) thereof, subparagraph (b) being eliminated." This modification was never accepted by the petitioner, but, on the contrary, was expressly rejected (R., 35).

It is evident from the facts of record and as found by the Court of Claims that when the Navy Department issued the order it had no idea that it was making a contract, and when the claimant received the order it had no other idea than that it was a requisition which it was required by law and its duty as a citizen to honor without protest or attempted evasion, trusting to the justice of its Government for just compensation.

Nothing is better settled in the law of contracts than that

“Wherever the parties are not at arm’s length, but one is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to, or withholding of property, as made under duress” (Lawson on Contracts, Sec. 261, and cases cited in 9 Cyc., 451).

In *Seaboard Air Line Ry. Co. et al. vs. United States*, 261 U. S., 299, 304-305; 43 Sup. Ct. Rep., 354, Mr. Justice Butler said:

“The owner’s right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * * The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.”

In the case at bar, as in the *Seaboard Air Ry. Co.* case, the only question is whether payment of the value of the property as of the date of taking is sufficient to constitute just compensation in a case where payment is resisted by the Government and is not finally made until years after the taking.

Under decisions of this Court petitioner is entitled to interest at a reasonable rate to make up the full measure of just compensation required by the Constitution of the United States and the statutes aforesaid, in order to place it in as favorable position as it would have been had compensation been paid contemporaneously with the taking.

Payment has been withheld from petitioner since the last delivery made under the above-mentioned order, on January 23, 1919, and petitioner is entitled to such interest as will place it in approximately the same financial position as other companies similarly situated, who have already received their compensation and who have not been compelled to resort to years of supplication in the executive department and litigation in the courts of the Government for the recovery of that which is admittedly due.

C.

“Just Compensation” Includes Interest when Payment is Not Made Contemporaneously with the Taking of the Property.

What is just compensation is a judicial question and is not left to the determination of any executive department. This Court has repeatedly held that if the compensation is paid contemporaneously with the taking, just compensation means the fair market value of the property.

“There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent

for the property taken" (Monongahela Navigation Co. *vs.* U. S., 148 U. S., 312; 37 L. Ed., 463).

The courts alone can determine what is just compensation.

"The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be, or to prescribe any binding rule in that regard" (U. S. *vs.* New River Collieries Co., 262 U. S., 341).

As stated by this Court in Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S., 304, citing Monongahela Navigation Co. *vs.* U. S., 148 U. S., 312, 327:

"Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."

It might be properly added, in the language of Mr. Justice Brewer in the Monongahela case (13 Sup. Ct. Rep., 633), that

"the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken."

This makes it important to determine, not alone the amount the Government would have been compelled to pay for the materials taken, but how much the claimant is out of pocket as a result of the taking and failure of the Government to pay at the time of the

taking. Any correct idea of "just compensation" requires that the claimant be fully compensated for his losses as a result of the taking.

This Court, in *New River Collieries Company vs. United States*, *supra*, approved the rule followed by the circuit court of appeals in its decision of the question, which was stated as follows:

"If it be an article commonly traded in on a market, and it is shown that, at the time and place it was taken, there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition" (262 U. S., 345).

The foregoing expressions of opinion by this Court relate to compensation paid contemporaneously with the taking of the property.

The claimant in the case at bar asks for compensation based upon an invoice price which was 5 per cent less than the prevailing market price to its most-favored customers, together with interest on unpaid balances, in order to place it in as good a position as it would have been if its goods had not been requisitioned by the Government, but had been sold in open market.

What would have been just compensation if paid contemporaneously is not necessarily just compensation when payment is not made contemporaneously. It was definitely settled by the decision of the Supreme Court in the case of *Seaboard Air Line Railway Company vs. United States*, *supra*, that section

177 of the Judicial Code has no application to a claim for just compensation for the taking of property. The Court said :

“The requirements that just compensation shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.” *Interest at a proper rate is a good measure by which to ascertain the amount so to be added* (underscoring ours), (43 Sup. Ct. Rep., 356).

That interest from the date of the taking is properly allowable was also held in *United States vs. Benedict*, 261 U. S., 294; 43 Sup. Ct. Rep., 354; *United States vs. Rogers*, 255 U. S., 163; 41 Sup. Ct. Rep., 281; *Brooks-Scanlon Corporation vs. United States*, 265 U. S., 106; 44 Sup. Ct. Rep., 471.

In the case of *United States vs. Rogers et al.*, *supra*, the Court held that in assessing the compensation for property taken by the United States for public use the allowance of interest on the value of the property taken at the rate of 6 per cent, which was the rate prevailing in the State, from the date of the taking until the deposit of the money in court was a proper allowance as a part of the compensation.

In the case of Seaboard Air Line Railway Company *et al. vs. United States, supra*, the Court held that where the United States requisitioned property for war purposes and took possession before ascertaining or paying compensation the owner is not limited to the value of the property at the time of taking, but is entitled to such additions as will produce the full equivalent of that value paid contemporaneously with the taking, and the allowance of interest on the value found by the jury at the legal rate established by the State in which the property was situated, was a fair and reasonable method of ascertaining that element of just compensation.

In Brooks-Scanlon Corporation *vs. United States, supra*, the Court, citing the foregoing decisions, said:

“* * * and, if the taking precedes the payment of compensation, the owner is entitled to such additions to the value at the time of taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added” (44 Sup. Ct. Rep., 474).

D.

The Provision of the Fifth Amendment of the Constitution of the United States Requiring that Just Compensation be Paid for Private Property Taken for Public Use Should be Liberally Construed in Favor of the Claimant.

No better statement of the foregoing principle can be found than that of Mr. Justice Bradley in *Boyd vs.*

United States, 116 U. S., 616, 635; 6 Sup. Ct. Rep., 524, quoted by Mr. Justice Brewer in *Monongahela Navigation Co. vs. United States*, 148 U. S., 312; 13 Sup. Ct. Rep., 622, 626, as follows:

“Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.”

To the foregoing language of Mr. Justice Bradley, Mr. Justice Brewer added the following:

“The language used in the fifth amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right of power in the Government; the last (the one in point here) being: ‘Nor shall private property be taken for public use without just compensation.’ The noun ‘compensation,’ standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages; the former being the equivalent for the injury done, and the latter imposed by

way of punishment. So that, if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken; * * *'' (Monongahela Navigation Co. *vs.* United States, 13 Sup. Ct. Rep., 626).

Conclusion.

On authority of Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S., 299; 43 Sup. Ct. Rep., 354; Brooks-Seanon, Inc., *vs.* United States, 265 U. S., 106; 44 Sup. Ct. Rep., 471, and other decisions of this Court, the writ of certiorari should be granted in order that the necessary and proper proceedings should be had looking to the correction of the error on the part of the Court of Claims in refusing to allow interest as a part of the measure of just compensation guaranteed to the petitioner by the Constitution and statutes of the United States.

Respectfully submitted,

HUMPHREYS & DAY,
Attorneys for the Petitioner.

ADRIAN C. HUMPHREYS,
CHESTER A. GWINN,
Of Counsel.

